Supreme Court of the United States

OCTOBER TERM, 1968

No. 366

UNITED STATES OF AMERICA, *Appellant*,

—v.—

HENRY PRESTON COVINGTON, *Appellee*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

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DOCKET ENTRIES IN DISTRICT COURT

DATE		PROCEEDINGS
11-29-67	(1)	Indictment filed
12-14-67		Plea of not guilty entered as to the one count, bond continued. (electronic recording of arraignment filed, see envelope no. 11)
1-10-68	(2)	Reporter's transcript of arraignment filed.
3-11-68	(3)	Defendant's motion to dismiss the indictment and memorandum in support filed.
3-13-68	(4)	Praecipe filed by the U.S. Attorney, 3 subpoenas issued to the U.S. Marshal.
3-15-68	(5)	Memorandum of the U.S. contra the motion to dismiss indictment filed.
3-26-68	(6)	Returns of the U.S. Marshal on the subpoenas issued 3-13-68 for Gilbert Weaver and Sgt. John Kaiser filed.
3-27-68	(7)	Opinion and Order filed, the motion of the Defendant to dismiss the indictment is granted. Copies delivered to the U.S. Attorney and mailed to Mr. Davis.
3-28-68	(8)	Return of the U.S. Marshal on the subpoena issued 3-13-68 for Stanley G. Hall filed.
4- 3-68	(9)	Motion by U.S. Attorney for reconsideration of the order dismissing the indictment and memorandum in support filed.
4- 3-68	(10)	Amended motion by the U.S. Attorney for reconsideration of the order dismissing the indictment and memorandum in support filed.
4-10-68	(11)	Memorandum of the U.S. in support of the petition for reconsideration filed.

DATE		PROCEEDINGS
5- 6-68	(12)	Order filed, Defendant's motion was properly granted and the dismissal of the indictment shall stand as the order of the Court. Copies delivered to the U.S. Attorney and mailed to Mr. Davis.
6- 4-68	(13)	Notice of appeal to the Supreme Court of the United States filed. Copy mailed to Mr. Davis.
6-27-68		Record certified to the Clerk of the Supreme Court of the United States.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF OHIO

Eastern Division

Criminal No. 9041

26 U.S.C. 4744(a)(1)

UNITED STATES OF AMERICA

vs.

HENRY PRESTON COVINGTON

THE GRAND JURY CHARGES:

COUNT I

That on or about August 11, 1967, within the Eastern Division of the Southern District of Ohio, HENRY PRESTON COVINGTON, being a transferee of marihuana required to pay the tax imposed by Title 26, United States Code, Section 4741(a), did acquire and obtain approximately 737.1 grams of marihuana without having paid such tax. In violation of 26 U.S.C. 4744(a)(1).

ROBERT M. DRAPER
United States Attorney

/s/ Robert A. Bell
Assistant United States Attorney

IN THE
UNITED STATES DISTRICT COURT OF OHIO
SOUTHERN DISTRICT
Eastern Division
[Title Omitted]

MOTION TO DISMISS

Now comes the defendant Henry Preston Covington, through his Attorney, and moves the Court, that the indictment against him under 26 U.S.C. 4744 (a) (1), be dismissed by reason of the fact that said law requires the defendant to incriminate himself contrary to the Fifth Amendment to the United States Constitution.

WILLIAM J. DAVIS
Attorney for Defendant

MEMORANDUM IN SUPPORT OF MOTION

The defendant bases his motion on a series of cases reported in Vol. 19 L ed 2d, February 26, 1968. The citations will therefore be from the Lawyers' Edition, because of the recent publication of the cases. The cases in question are *Marchetti* v *United States*, 19 L ed 2d 889, *Grosso* v *United States*, 19 L ed 2d 906 and *Haynes* v *United States*, 19 L ed 2d 923. A careful reading of these cases indicates that they specifically overrule *United States* v *Kahriger* 97 L ed 754 and *Lewis* v *United States* 99 L ed 475 and as aptly stated by Chief Justice Warren in his dissent to *Grosso* v *U. S.*, these cases open the door for "a new wave of attacks on a number of Federal registration statutes wherever the registration requirement touches upon allegedly illegal activities", See *Grosso* v *U. S.* 19 L ed at Pg. 921. It is interesting to note that it was the opinion of the Chief Justice in his dissent that these three cases also affected the requirements for registration as to dealers in marihuana.

The defendant in the present case is charged with being the transferee of marihuana and with failing to pay the tax required by Title 26 U.S.C. Sec. 4741 (a), said failure being a violation of 26 U.S.C. 4744 (a) (1). It follows from a careful reading of *Haynes* v *U. S.*, *Grosso* v *U. S.*

and *Marchetti v. U. S.* that the particular tax scheme on which the defendant faces the Court bears a substantial and close relation to the schemes involved in these three cases and especially in the Haynes case, since in the present case the defendant would be required to register as the transferee of contraband goods, to wit marihuana, which is a contraband punishable for possession both under the laws of the State of Ohio. The nature of the information required by the statute is evidenced by the Notice and Demand served on the defendant by Narcotic Agent Jack L. Lloyd dated August 11, 1967, which would require the defendant to produce a copy of an official order form as required under Section 4742 of Internal Revenue Code indicating the transfer of marihuana. Since marihuana is contraband goods and is punishable in its possession both under the United States Code and under the statute of the State of Ohio, the information requested, the registration requested and the whole tax scheme is incriminatory, and we can only assume that here is a clear Governmental scheme to gather evidence from citizens in order to secure their conviction of crimes. This contravenes the privilege of the Fifth Amendment to the United States Constitution. See Albertson v S.A.C.B. 15 L ed 2d 165.

Since the tax scheme invisioned by 26 U.S.C. 4741 (a) as applied to the defendant under this indictment with reference to violation of 26 U.S.C. 4744 (a) (1) involves a compulsory legal scheme requiring the defendant to admit that he is indulging in illegal activities which violate the laws of the United States and the laws of the State of Ohio (See Ohio Revised Code 3719.09), it is the contention of the defendant that said law is in violation of his privilege against self-incrimination as guaranteed by the Fifth Amendment to the United States Constitution. It follows that under the recent case law enunciated by the Supreme Court (Marchetti, Grosso and Haynes) the indictment against the defendant should be dismissed, and the defendant respectfully requests that the Court dismiss said indictment.

Attorney for Defendant
WILLIAM J. DAVIS

[Certificate of Service Omitted]

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF OHIO

Eastern Division

Criminal No. 9041

UNITED STATES OF AMERICA, PLAINTIFF

vs.

HENRY PRESTON COVINGTON, DEFENDANT

OPINION AND ORDER

Defendant is charged by indictment with being a transferee of and acquiring a quantity of marihuana without having paid the tax imposed by law, in violation of Title 26, United States Code, Section 4744(a)(1).

Following his plea of not guilty upon arraignment, defendant filed a motion to dismiss the indictment. In its consideration of this motion, the Court has had the assistance of the supporting and contra memoranda.

Title 26, United States Code, Section 4741(a) provides:

> (a) Rate.—There shall be imposed upon all transfers of marihuana which are required by section 4742 to be carried out in pursuance of written order forms taxes at the following rates:
>
> (1) Transfers to special taxpayers.—Upon each transfer to any person who has paid the special tax and registered under sections 4751 to 4753, inclusive, $1 per ounce of marihuana or fraction thereof.
>
> (2) Transfers to others.—Upon each transfer to any person who has not paid the special tax and registered under sections 4751 to 4753, inclusive, $100 per ounce of marihuana or fraction thereof. . . .

Section 4742, which forms the basis for determining taxable transfers, provides:

> (a) General requirement.—It shall be unlawful for any person, whether or not required to pay a special

tax and register under sections 4751 to 4753, inclusive, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate.

(b) Exceptions.—Subject to such regulations as the Secretary or his delegate may prescribe, nothing contained in this section shall apply—

(1) Professional practice.—To a transfer of marihuana to a patient by a physician, dentist, veterinary surgeon, or other practitioner registered under section 4753, in the course of his professional practice only: Provided, That such physician, dentist, veterinary surgeon, or other practitioner shall keep a record of all such marihuana transferred, showing the amount transferred and the name and address of the patient to whom such marihuana is transferred, and such record shall be kept for a period of 2 years from the date of the transfer of such marihuana, and subject to inspection as provided in section 4773.

(2) Prescriptions.—To a transfer of marihuana, made in good faith by a dealer to a consumer under and in pursuance of a written prescription issued by a physician, dentist, veterinary surgeon, or other practitioner registered under section 4753: Provided, That such prescription shall be dated as of the day on which signed and shall be signed by the physician, dentist, veterinary surgeon, or other practitioner who issues the same: Provided further, That such dealer shall preserve such prescription for a period of 2 years from the day on which such prescription is filled, so as to readily accessible for inspection by the officers, employees, and officials mentioned in section 4773.

(3) Exportation.—To the sale, exportation, [illegible] ment, or delivery of marihuana by any person within the United States, any Territory, the District of Columbia, or any of the insular possessions of the United States, to any person in any

foreign country regulating the entry of marihuana, if such sale, shipment, or delivery of marihuana is made in accordance with such regulations for importation into such foreign country as are prescribed by such foreign country, such regulations to be promulgated from time to time by the Secretary of State of the United States.

(4) Government and state officials.—To a transfer of marihuana to any officer or employee of the United States Government or of any State, Territorial, District, county, or municipal or insular government lawfully engaged in making purchases thereof for the Department of Defense, the Public Health Service, and for Government, State, Territorial, District, county, or municipal or insular hospitals or prisons.

(5) Certain seeds.—To a transfer of any seeds of the plant Cannabis sativa L. to any person registered under section 4753. . . .

Failure to pay the tax imposed is a violation of Title 26, United States Code, Section 4744 (a) (1):

(a) Persons in general.—It shall be unlawful for any person who is a tranferee required to pay the transfer tax imposed by section 4741 (a)—

(1) To acquire or otherwise obtain any marihuana without having paid such tax. . . .

The basis of defendant's motion is the allegation that the foregoing statutory scheme is, at least as to him, violative of the Fifth Amendment to the United States Constitution in that it requires a person to incriminate himself.

What has evidently prompted this motion is a group of decisions recently entered by the United States Supreme Court. *Marchetti* v. *United States*, 36 U.S.L. Week 4143 (Jan. 29, 1968); *Grosso* v. *United States*, 36 U.S.L. Week 4150 (Jan. 29, 1968); *Haynes* v. *United States*, 36 U.S.L. Week 4164 (Jan. 29, 1968). In those cases it was determined that criminal prosecutions under the statutes imposing the annual occupational tax on gamblers,[1] the require-

[1] Title 26, United States Code, Section 4411; *Marchetti*.

ment to register before engaging in the business of accepting wagers,[2] the excise tax on wagering,[3] and a criminal penalty on possessors of "unregistered firearms"[4] were each subject to an absolute defense in the form of an assertion that the statute was unconstitutional inasmuch as each one had the effect of compelling the respective defendants, and others similarly situated, to incriminate themselves. The questioned statutes required disclosure of past, present or prospective activities in areas "permeated with criminal statutes." *Marchetti, supra.* Compliance with any of the statutory requirements were directed at persons inherently suspect of criminal activities and created real, appreciable and substantial hazards of self-incrimination. *Ibid.* The hazards were particularly emphasized by the further statutory requirement that a list of all such taxpayers be made available for public inspection. Title 26, United States Code, Section 6107.[5]

A reading of the statutory tax scheme presently in question discloses that it, like those previously declared "unconstitutional," raises more than merely imaginary hazards of self-incrimination. The hazards here are likewise real, appreciable and substantial, and the statutory requirements, with the many exclusions, are primarily directed at those who are inherently suspect of criminal activities.[6] Again,

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[2] Title 26, United States Code, Section 4412; *Marchetti.*

[3] Title 26, United States Code, Section 4401; *Grosso.*

[4] Title 26, United States Code, Section 5851; *Haynes.*

[5] That section provides that:

> In the principal internal revenue office in each internal revenue district there shall be kept, for public inspection, an alphabetical list of the names of all persons who have paid special taxes under subtitle D or E with respect to a trade or business carried on within such district. Such list shall be prepared and kept pursuant to regulations prescribed by the Secretary or his delegate, and shall contain the time, place, and business for which such special taxes have been paid, and upon application of any prosecuting officer of any State, county, or municipality there shall be furnished to him a certified copy thereof, as of a public record, for which a fee of $1 for each 100 words or fraction thereof in the copy or copies so requested may be charged.

[6] In Ohio, criminal penalties are provided for persons who are subject to the taxing provisions herein questioned. Ohio Rev. Code,

as was the case of persons who complied with the statutes challenged in *Marchetti*, *Grosso*, and *Haynes*, those who pay the tax imposed by § 4741(a) are subject to having their names published in a list made available to interested prosecuting authorities by virtue of § 6107.[7]

As in the recent Supreme Court trilogy, this Court must also consider the relevance of the "required records" doctrine of *Shapiro* v. *United States*, 335 U.S. 1 (1948). The same elements which served to distinguish the situations

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§§ 3719.01 - 3719.36, 3719.99 (1953). Similar statutes prevail in other jurisdictions. See, e.g., Ala. Code, Tit. 22, §§ 256 - 258 (1958); Alaska Stat. §§ 17.10.010 - 17.10.240 (1962); Ariz. Rev. Stat. §§ 36-1001 - 36-1024 (1956); Ark. Stat. §§ 82-1001 - 82-1024 (1947); Cal. Health and Safety Code, §§ 11001 - 11853 (1964); Colo. Rev. Stat. §§ 48-6-1 - 48-6-22 (1953); Conn. Gen Stat. §§ 19-244 - 19-268 (1958); Del. Code Ann., Tit. 16, §§ 4701 - 4722 (1967); Fla. Stat. Ann. §§ 398.01 - 398.23 (1963); Ga. Code Ann. §§ 42-801 - 42-822, 42-9917 - 42-9919 (1957); Hawaii Rev. Laws §§ 52-10 - 52-39 (1955); Idaho Code §§ 37-2301 - 37-2323 (1957); Ill., S.H.A., c. 38, §§ 22-1 - 22-49 (1964); Ind. Stat. Ann. §§ 10-3519 - 10-3550 (1956); Iowa Code Ann. §§ 204.1 - 204.25 (1946); Kan. Stat. Ann. c. 65, Art. 25 (1963); Ky. Rev. Stat. §§ 218.010 - 218.240 (1962); La. Stat. Ann. 40:961 - 40:984 (1951); Me. Rev. Stat. Ann., Tit. 22, §§ 2361 - 2380 (1964); Md. Ann. Code, Art. 27, §§ 276 - 306 (1957); Mass. Ann. Laws, c. 94 §§ 197 - 217D (1957); Mich. Comp. Laws Ann. §§ 335.51 - 335.77 (1961); Minn. Stat. Ann. §§ 618.01 - 618.25 (1963); Miss. Code Ann., Tit. 25, c. 2 (1942); Mo. Rev. Stat. Ann., c. 195 (1959); Mont. Rev. Codes Ann. §§ 54-101 - 54-128 (1947); Neb. Rev. Stat. §§ 28-451 - 28-472.01 (1943); Nev. Rev. Stat. § 453.010 (1963); N.H. Rev. Stat. Ann., c. 318-A, §§ 1 - 26 (1964); N.J. Rev. Stat. Ann., Tit. 24, c. 18 (1940); N.M. Stat. §§ 54-7-1 - 54-7-51 (1953); N.Y. Pub. Health Law, Art. 33 (1953); N.C. Gen. Stat., c. 90, Art. 5 (1958); N.D. Cent. Code Ann. §§ 19-03-01 - 19-03-32 (1960); Okla. Stat. Ann., Tit. 63, §§ 466 - 469A (1963); Ore. Rev. Stat., Tit. 37, c. 474 (1967); Pa. Stat. Ann., Tit. 35, §§ 780-1 - 780-31 (1964); R.I. Gen. Laws Ann. §§ 21-28-1 - 21-28-66 (1956); S.C. Code Ann. §§ 32-1461 - 32-1495 (1962); S.D. Code, Tit. 22, §§ 1301 - 1324 (1939); Tenn. Code Ann. §§ 52-1301 - 52-1323 (1966); Tex. Pen. Code Ann., Art. 725b (1961); Utah Code Ann. §§ 58-13a-48 (1953); Vt. Stat. Ann., Tit. 18, §§ 4141 - 4163 (1959); Va. Code Ann., Tit. 54, §§ 487 - 519 (1950); Wash. Rev. Code §§ 69.33.220 - 69.33.960 (1959); W.Va. Code Ann. §§ 16-8A-1 - 16-8A-26 (1961); Wis. Stat. Ann. §§ 161.275 (1957); Wyo. Stat. Ann., Tit. 35, §§ 348 - 371 (1957).

[7] See, *United States* v. *Sanchez*, 340 U.S. 42 (1950), as to the obviousness of the Congressional intent to aid in the regulation of the illicit traffic in marihuana.

of those cases from that of *Shapiro* are present in the instant matter. Stated otherwise, defendant was "required simply to provide information, unrelated to any records which he may have maintained," there were no "public aspects" to the information sought, and the requirements here are directed to a "selective group inherently suspect of criminal activities." *Marchetti; Albertson* v. *SACB*, 382 U.S. 70, 79 (1965); *Shapiro*. Similarly distinguishable is *United States* v. *Sullivan*, 274 U.S. 259 (1927).

Finally, as in *Marchetti*, *Grosso*, and *Haynes*, this Court does not feel it within its province to engraft immunity restrictions [8] on the tax system in question here. Congress has made it quite clear that disclosure of marihuana transfer tax payments is to be made to prosecuting authorities. § 6107. See also, *United States* v. *Sanchez*, 340 U.S. 42 (1950). It is for the legislature, rather than the judiciary, to make new law; the judiciary can only say whether a statutory enactment of legislative intent, or its enforcement, in a particular instance, is constitutionally permissible.

WHEREFORE, the Court determines that the defendant has properly asserted the constitutional privilege against self-incrimination as a total defense to prosecution in this case. However, the Court also feels compelled to add that nothing determined herein serves as a holding that the marihuana tax provisions are unconstitutional or that the states may not continue to enforce their statutes prohibiting the sale, possession, etc., of marihuana. As to the application of the federal tax provisions, their enforcement through penalties may continue against persons not confronted by real, appreciable or substantial hazards of self-incrimination, or persons who are otherwise outside of the privilege's protection.

The motion to dismiss the indictment is GRANTED.

/s/ Joseph P. Kinneary
United States District Judge

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[8] See *Murphy* v. *Waterfront Comm'n.*, 378 U.S. 52 (1964), as an example of immunity restrictions imposed within the province of the judiciary.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF OHIO

Eastern Division

[Title Omitted]

MOTION FOR RECONSIDERATION

Now comes the United States Attorney on behalf of the United States of America and requests the Court to reconsider its order dismissing this case.

ROBERT M. DRAPER
United States Attorney

/s/ Charles R. Dersom
Assistant United States Attorney

MEMORANDUM

It has come to the attention of the U. S. Attorney that a similar case was decided on February 7, 1968, in the Southern District of New York by Judge Motley and that the constitutionality of the code sections relating to the marihuana tax were upheld.

At this time a memorandum is being prepared relative to the constitutionality of the tax and will be submitted to the Court on or before April 10, 1968. The memorandum will also cite regulations which prohibit those illegally engaged with marihuana from obtaining the order forms and, thus, overcoming any self-incrimination argument. Therefore, due to the significant effect of this case and in the national interest, it is requested that the motion to dismiss be reconsidered in light of the memorandum to be submitted within the next seven days.

ROBERT M. DRAPER
United States Attorney

/s/ Charles R. Dersom
Assistant United States Attorney

[Certificate of Service Omitted]

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF OHIO
Eastern Division

[Title Omitted]

AMENDED MOTION FOR RECONSIDERATION

Now comes the United States Attorney on behalf of the United States of America and requests the Court to reconsider its order dismissing this case.

ROBERT M. DRAPER
United States Attorney

/s/ Charles R. Dersom
Assistant United States Attorney

MEMORANDUM

At this time a memorandum is being prepared relative to the constitutionality of the tax and will be submitted to the Court on or before April 10, 1968. The memorandum will cite regulations which prohibit those illegally engaged with marihuana from obtaining the order forms and, thus, overcoming any self-incrimination argument. Therefore, due to the significant effect of this case and in the national interest, it is requested that the motion to dismiss be reconsidered in light of the memorandum to be submitted within the next seven days.

ROBERT M. DRAPER
United States Attorney

/s/ Charles R. Dersom
Assistant United States Attorney

[Certificate of Service Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

Eastern Division

[Title Omitted]

MEMORANDUM IN SUPPORT OF PETITION FOR RECONSIDERATION

This memorandum is intended to bring to the attention of the Court certain matters which were not fully set forth in the Government's response to defendant's motion to dismiss. It is the Government's view that the points discussed herein are dispositive of the issue of the constitutionality of the statute under which the defendant was charged and that reconsideration of the Court's original opinion and order is therefore justified.

In brief, the Government contends that, as a result of regulations issued by the Commissioner of the Bureau of Narcotics, only persons entitled under state law to use marihuana can register under Section 4753 of Title 26 and secure an order form under Section 4742. Thus, a transferee who pays the transfer tax imposed by Section 4741 and provides the transferor with the required order form has complied with federal law and can in no way incriminate himself under state law. Those who are not qualified to register and obtain order forms are, in essence, prohibited from dealing in marihuana.

I. *Objectives of the Marihuana Taxing Act*

The Marihuana Taxing Act, 50 Stat. 551 (1937), now 26 U.S.C. 4741, et seq., was originally enacted to achieve two objectives: first, to develop a source of revenue, and second, to limit the illicit use and punish the illegal transfer of the drug. See S. Rep. No. 900, H.R. Rep. No. 792, 75th Cong., 1st Sess. (1937). The Senate report summarizes the methods to be used to accomplish the purposes of the bill as follows (p. 3):

> Thus, the bill is designed, through the occupational tax and the order-form procedure, to publicize *legitimate* dealings in marihuana and through the $100 transfer tax to prevent the drug from coming into the hands of those who will put it to illicit uses. (Emphasis supplied.)

In drafting what are now Sections 4741 and 4744, however, Congress acted, perforce, on the basis of the extent to

which marihuana was regulated in 1937, and it is the purpose of this memorandum to show that, as the states developed more encompassing legislation and as the medical use of the drug dwindled, it was necessary for the Commissioner of Narcotics to place an administrative interpretation on the statute which would bring the congressional purpose into line with the modern realities of marihuana control.[1] That interpretation is embodied in the regulations (attached to this memorandum) issued jointly by the Commissioner of Narcotics and the Commissioner of Internal Revenue, and its effect is to eliminate any possibility that one dealing in marihuana will be forced to divulge incriminating information or risk being subjected to criminal sanctions for failing to make such a divulgence.

As the defendant points out in his memorandum in support of the motion to dismiss, the payment of the transfer tax imposed by Section 4741(a) and the requirement that the tranferee secure an order form under Section 4742(a) are inextricably intertwined. Although the defendant is charged with being a transferee without having paid the transfer tax, any claim that he has been forced to incriminate himself must call for an examination of the order form provisions, for the stamps which represent payment of the tax are to be affixed to the form (Section 4743), and his failure to produce the form on demand of the Secretary's delegate is presumptive evidence of his violation of Section 4744. It is, then, crucial to determine exactly what function Congress intended this statutory scheme to perform, and to that end the following statement of the Honorable Frank H. Buck, one of the sponsors of the act, is pertinent:

> It is further *made illegal to transfer marihuana except in pursuance of a written order* from the trans-

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[1] Section 7805(a) of Title 26, United States Code, reads in part:

> . . . The Secretary or his delegate shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue. .

The use of the regulatory power for the purposes involved here is clearly proper. *United States* v. *Fisher*, 353 F.2d 396, 398 (5th Cir. 1965); Sutherland, *Statutory Construction*, Ch. 40, §§ 4002, 4003 (3rd Ed.)

feree on a form to be issued by the Secretary of the Treasury, and upon all such transfers is levied a tax at the rate of $1 per ounce, or fraction thereof, on transfers to persons registered under the act, and at the rate of $100 per ounce, or fraction thereof, on transfers to persons not registered under the act. *It is made illegal for a transferee to acquire marihuana without payment of the transfer tax.* (Emphasis supplied.) 81 Cong. Rec. 1440, 1441 (1937)

It is clear from this excerpt that Congress contemplated that there could be legal transfers to persons who were not registered under Section 4753, and that conclusion is borne out by the language of Section 4741 ("there shall be imposed upon all transfers . . . to any person who has not paid the special tax") and Section 4742 ("it shall be unlawful for any persons, whether or not required to pay a special tax and register"). Although even in 1937 there would not have been many occasions on which such a transfer would have been possible, the failure of some states to enact the type of complete regulatory legislation which is now present in all fifty would have made it possible for an individual who was not a dealer to make a single purchase of marihuana if he was willing to pay the $100 tax designed to discourage just such potentially dangerous transactions.[2] There is no doubt that such a person could have forced the district director to provide him with an order form so that he could pay the tax and thus comply with the federal law, and it was therefore necessary to make some statutory provision for him.

Thirty-one years after the enactment of the Marihuana Taxing Act circumstances have changed markedly. Today all states have the type of comprehensive legislation which, with certain narrow exceptions modeled on those contained in Section 4742, forbids the transfer of marihuana. The small group of unregistered persons who had the right to obtain an order form in 1937 has disappeared, and, in essence, there can now be no collection of the $100 tax

[2] In 1937 only thirty-nine states and the District of Columbia had adopted the Uniform Narcotic Drug Act, and the report of the Bureau of Narcotics on the *Traffic in Opium and Other Dangerous Drugs* (1938) states that seven states had passed neither the Uniform Act nor other adequate narcotic legislation.

before the transfer occurs.[3] To say that the district director must issue an order form to anyone requesting it is to say that he must, in some sense, aid in the commission of offenses under state law, and to protect the federal government from being placed in that position the regulations provide (26 C.F.R. § 152.23):

> The application of every person shall show that, under the laws of the jurisdiction in which he is operating or proposes to operate, he is legally qualified or lawfully entitled to engage in the activities for which registration is sought.

Further, the regulations deny order forms to anyone who is not registered,[4] and thus the applicant who fails to show that he would not be in violation of state law is barred from providing any of the self-incriminatory information which the defendant asserts he is being punished for failing to furnish.

The conclusion to be drawn is essentially very simple: prepayment of the transfer tax at the rate of $1 per ounce under Section 4741(b) is enforceable as to all legal transfers of marihuana; prepayment of the $100-per-ounce tax is now impossible, and so, as regards transfers to unregistered persons, Section 4744 now constitutes an absolute prohibition. This result comports fully with the congressional intent to publicize legitimate transactions in marihuana and to keep the drug out of the hands of those who would put it to unlawful use, and, in addition, it obviates totally any potential constitutional infirmity.

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[3] Of course, the Government is not foreclosed from collecting the $100 tax *after* it has been established that a transfer was made to an unregistered person.

[4] Although there is no specific provision which limits the dispensing of order forms, the stated result must follow from a reading of § 152.67 and § 152.68, which require the signing of applications by the same person who signed the registration and the comparison of the two signatures by the district director before the order form may issue. It is important to note, too, that improper applications for order forms (including those which indicate that the applicant would not be operating legally under state law) are not made available to law enforcement agencies as are proper registrations under the provisions of 26 U.S.C. 4775 and 6107.

II. *Analogous Provisions of the Narcotics Statutes*

An instructive comparison can be made between the statutory provisions regulating the transfer of marihuana and those regulating the transfer of narcotic drugs. In the case of narcotics, the statutory provisions themselves specify that only those lawfully importing, selling or dealing in narcotics are subject to the occupational tax under 26 U.S.C. 4721 and are required to register under 26 U.S.C. 4722. See, *United States* v. *Jin Fuey Moy*, 241 U.S. 394. Order forms can be obtained by an individual only for "the use, sale, or distribution by him in the conduct of a lawful business in said drugs or in the legitimate practice of his profession." 26 U.S.C. 4705(g). This order form provision creates, in effect, "a kind of registration of lawful purchasers, in addition to one of lawful sellers. . ." *Nigro* v. *United States*, 276 U.S. 332, 345 (1928).

In short, by requiring these registries of lawful sellers and purchasers of narcotics, the Congress has sought to prevent unauthorized persons from obtaining drugs and selling them clandestinely without paying the taxes imposed by federal law. The identification of those who are lawful dealers in narcotics facilitates the detection of those who are unlawful dealers and renders their transactions more difficult, thus enabling the United States to maximize the tax revenues to which it is entitled. *Nigro, supra; United States* v. *Hymowitz*, 196 F.2d 819 (1952); *United States* v. *Wong Sing*, 260 U.S. 18 (1922); *United States* v. *Doremus*, 249 U.S. 86 (1919). Persons dealing in contraband drugs are not subject to prosecution for failure to comply with the registration provisions and are punishable only under Section 4704 (prohibiting sales other than from the original stamped package) or Section 4705 (requiring that all transfers be pursuant to a written order). In neither case is a Fifth Amendment problem presented.

III. *Conclusion*

The basic objection to the statutory schemes involved in *Marchetti* v. *United States*, 390 U.S. 39 (1968), *Grosso* v. *United States*, 390 U.S. 62 (1968), and *Haynes* v. *United States*, 390 U.S. 85 (1968), was that they faced the defendant with an insoluble dilemma; he could come forward

and admit his past participation or future involvement in criminal activity or he could refuse to come forward and thus open himself up to prosecution for failure to register as required. The Supreme Court was unwilling to permit the government to enact interlocking registration and penal statutes which compelled incriminatory admissions on the one hand and punished unwillingness to confess on the other, but one who plans to be a transferee of marihuana must choose between two totally different and entirely permissible alternatives: either he must qualify under state law as a transferee and then register those qualifications or he must refrain from dealing in the drug altogether. Since no registration is permitted unless the applicant could legally acquire marihuana and since order forms are issued only to registrants, self-incrimination is impossible.

The Government therefore submits that Section 4744(a) of Title 26 is entirely constitutional and that the opinion and order of this Court dated March 27, 1968, should be recalled and the motion to dismiss the indictment denied.

[Note: It has come to the attention of the Government that the full bench of the Court of Appeals for the Fifth Circuit reconsidered the panel's opinion in *Leary* v. *United States*, decided September 29, 1967, in light of the Supreme Court's decisions in *Marchetti*, *Grosso* and *Haynes* and, on March 29, 1968, affirmed the conviction, holding that those cases do not affect the validity of either 21 U.S.C. 176a or 26 U.S.C. 4744.]

Respectfully submitted,

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[Certificate of Service Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

Eastern Division

Criminal No. 9041

UNITED STATES OF AMERICA, PLAINTIFF

vs.

HENRY PRESTON COVINGTON, DEFENDANT

ORDER

This matter is before the Court on the motion of the United States for reconsideration of the Court's order of March 27, 1968, dismissing the indictment.

The memorandum filed in support of this motion submits that a person who is a transferee of marihuana in violation of state laws will not be issued an order form for marihuana. It is asserted that this rids the statute of any trace of unconstitutionality. This Court did not decide that the marihuana taxing provisions are in themselves unconstitutional; it merely determined that, as applied to this defendant, they would be unconstitutional.

If defendant had no obligation to pay the tax and obtain an order form, the United State had no basis on which to seek an indictment. The Court does not agree that Section 4744 (the statute under which defendant was indicted) is now an absolute prohibition. Section 4744 is based explicitly on Section 4741(a). If 4741(a) is not applicable to defendant, then there is no basis for the indictment. Therefore, in any event, the indictment should be dismissed.

WHEREUPON, the Court determines that defendant's motion was properly granted, and the dismissal of the indictment shall stand as the Order of the Court.

/s/ Joseph P. Kinneary
United States District Judge

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF OHIO
Eastern Division

[Title Omitted]

NOTICE OF APPEAL

Notice is hereby given that the United States of America hereby appeals to the Supreme Court of the United States from the Order dismissing the indictment on reconsideration entered in this proceeding on the 6th day of May, 1968. This appeal is taken pursuant to Title 18, United States Code, Section 3731.

Dated: June 4, 1968.

ROBERT M. DRAPER
United States Attorney

/s/ Charles R. Dersom
CHARLES R. DERSOM
Assistant United States Attorney
Attorneys for the United
States of America

[Certificate of Service Omitted]

SUPREME COURT OF THE UNITED STATES

No. 366, October Term, 1968

UNITED STATES, APPELLANT

v.

HENRY PRESTON COVINGTON

APPEAL from the United States District Court for the Southern District of Ohio.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The case is placed on the summary calendar and set for oral argument immediately following No. 65.

October 21, 1968

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